IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Dependency of:	)	No. 61775-3-I
	)	(Consolidated with
J. A. T. (DOB: 12/11/07),	)	No. 61970-5-I)
	)	
a minor child,	)	DIVISION ONE
	)	
STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES,	)	
	)	
Respondent,	)	UNPUBLISHED
	)	
v.	)	FILED: July 13, 2009
	)	
JAMES THOMAS and MARINA THOMAS,	)	
	)	
Appellants.	)	
	)	

Cox, J. — James Thomas and Marina Thomas,[1] husband and wife, appeal separate dependency and disposition orders on behalf of their infant son, J.T.[2] Marina has failed in her burden to show that her trial counsel failed to provide effective assistance of counsel. Moreover, the findings of fact that she

[1] For the sake of clarity, we refer to the parties by their first names.

[2] We hereby grant the Department's Motion for Permission to File Corrected Brief.

challenges are supported by substantial evidence. Finally, the separate findings that James challenges are also supported by substantial evidence. We affirm.

J.T. was born on December 11, 2007. On December 14, the Department of Social and Health Services filed a petition alleging that J.T. was a dependent child under RCW 13.34.030(5)(c).

For the two years prior to his birth, J.T.'s parents had resided in Tent City Homeless Shelter. Prior to J.T.'s birth, James and Marina were married, but at the time J.T. was born, they lived in separate homeless shelters.

Marina has four other children, all of whom are older than J.T. None of her children live with her. Marina's two oldest children are dependent children placed with relatives. Her other two children live with their biological father.

The Department claimed in this action that two of Marina's four children had been adjudicated dependent and that she had not engaged in ordered services. The Department also alleged that James could not serve as the primary caregiver, in part, because he did not understand Marina's deficient parenting history and the impact it would have on J.T.

At trial, both parents had appointed counsel. Marina had appointed counsel from the Associated Counsel for the Accused (ACA) and she was also assisted by a Russian interpreter. The trial judge heard testimony from the parents, several Department social workers and supervisors, a court appointed special advocate for J.T., a parenting class teacher, and a friend of the father's from Tent City, among other witnesses. The court also admitted as evidence

certified copies of documents relating to the dependency cases of two of Marina's older children.

Prior to entry of the findings, conclusions, and orders, a dispute arose over whether trial counsel for Marina had provided effective assistance. She claimed he did not based on allegations that he had either slept or been inattentive during trial. She also claimed that he had a conflict of interest based on the fact that another attorney in his agency represented her oldest daughter in a separate dependency proceeding in which Marina was the adverse party. The trial court allowed substitution of new counsel for Marina, but did not otherwise expressly rule on the effective assistance of counsel question. Thereafter, the trial court entered the Department's proposed findings, conclusions, and orders.

James and Marina appeal.

EFFECTIVE ASSISTANCE OF COUNSEL

Marina first argues that she was denied effective assistance of counsel at trial. Specifically, she claims that her counsel fell asleep during trial and that he had a conflict of interest because another attorney in his agency represented her daughter in another proceeding adverse to Marina. We disagree.

In Washington, a parent has a statutory right to counsel at all stages of a dependency proceeding.[3] This right includes the right of an indigent parent to the effective assistance of appointed counsel.[4]

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[3] RCW 13.34.090(1).

[4] RCW 13.34.090(2) (parent in dependency has right to appointed

To prevail on a claim of ineffective assistance of counsel, a party must show deficient performance and resulting prejudice.[5] Counsel's performance is deficient if it falls "'below an objective standard of reasonableness based on consideration of all of the circumstances.'"[6] This inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.[7] To show prejudice, a party must show a "'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[8]

Counsel owes the client a duty of loyalty to avoid conflicts of interest.[9] In any situation where counsel represents conflicting interests, Washington courts apply the conflict of interest rules to determine whether the right to effective counsel was violated.[1] "[R]eversal is always necessary where a defendant

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counsel if indigent); RCW 10.101.005 (effective legal representation must be provided for indigent persons).

[5] In re Dependency of S.M.H. 128 Wn. App. 45, 61, 115 P.3d 990 (2005) (citing State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001)); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[6] Id. (quoting State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)).

[7] McFarland, 127 Wn.2d at 336.

[8] Id. at 335 (quoting Strickland, 466 U.S. at 694).

[9] Strickland, 466 U.S. at 688.

[1] State v. McDonald, 143 Wn.2d 506, 513, 22 P.3d 791 (2001); State v. Regan, 143 Wn. App. 419, 427, 177 P.3d 783, review denied, 165 Wn.2d 1012 (2008).

shows an actual conflict of interest adversely affecting counsel's performance."[11] In order to show adverse effect, the defendant need only demonstrate "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."[12] We review de novo whether the circumstances demonstrate a conflict under the ethical rules.[13]

Sleeping Claim

Marina argues she was deprived of effective assistance of counsel because her ACA appointed attorney, Kevin McLean, allegedly fell asleep during trial. Although this is a very serious claim, we find insufficient evidence in the record to support it.

First, Marina argues that the record shows McLean acknowledged having difficulty staying awake. She points to McLean's response after the judge asked counsel whether a start time of 8:30 a.m. would work for the following morning. McLean said, "As long as the cafeteria sells coffee that early, I will be here."[14]

Second, as evidence of sleeping, Marina points to places in the record where the court repeatedly called McLean's name, allegedly to waken him. For example, during the Department's direct examination of Marina at trial, the court

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[11] McDonald, 143 Wn.2d at 513.

[12] Regan, 143 Wn. App. at 428 (internal quotations omitted).

[13] Id.

[14] RP (March 26, 2008) at 696.

interrupted:

> The Court: Excuse me. I am going to take a short break. Mr. McLean? Mr. McLean? Kevin?
>
> Mr. McLean: Yes, your honor?
>
> The Court: I am going to ask you to talk to your client, okay – because – and I need you to be precise in your questioning and move this case. Okay? I am going to step off for five minutes while you talk to your client.[15]

Later, during cross-examination of Marina, the court interrupted again:

> The Court: You need to stop. When the interpreter says she needs to stop, we need to stop. We are going to take a short break. Mr. McLean? I keep losing you back there. All right? Counsel, what time do we need to break for you today?
>
> [Marina's counsel]: 11:45.
>
> The Court: 11:45? Well, let's take our 15 minute break, because I have got people falling over in their chairs. All right?[16]

Finally, after the break, the court again interrupted cross-examination, saying "Excuse me. Mr. MacLean? [sic]." McLean replied, "Yes. Yes."[17] Cross examination then resumed.

None of the above references, individually or collectively, supports the serious charge that counsel slept during trial. We note that nowhere in the above incidents does anyone expressly state that counsel was asleep during trial.

Marina also relies on the brief filed after trial by the Court Appointed

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[15] Report of Proceedings (March 27, 2008) at 722.

[16] Id. at 737.

[17] Id. at 743.

Special Advocate's counsel as evidence that McLean was sleeping. That brief addressed McLean's apparent "difficulties remaining attentive during portions of the trial" but is not accompanied by any declaration or affidavit to support the claim. Thus, the statement in the brief: "On at least one occasion during trial, Mr. McLean had to be awakened to cross-examine a witness" has no evidentiary support.

Marina also notes that the attorney from the Society of Counsel Representing Accused Persons (SCRAP) appointed to represent her after the ACA lawyer withdrew, voiced concerns about McLean and moved the court for a new trial. He stated:

> I put on the record today that [Marina] believes that she did not receive adequate counsel in her last trial . . . her attorney was ineffective as a result of perhaps a sleeping disorder or something . . . but believes that he did not represent her as zealously as he should have.[18]

Of course, the SCRAP attorney had no personal knowledge of what went on at trial and thus could not personally attest to whether McLean had been sleeping. Moreover, there is no record of Marina testifying to such event or events. The trial court properly denied the motion.

On this record, there is no showing that trial counsel was asleep during trial.

More significantly, there is no showing of prejudice. During the trial, McLean effectively cross-examined witnesses and objected to evidence and to

[18] Report of Proceedings (May 29, 2008) at 3.

the form of questions and testimony. In addition, he presented Marina's testimony and at least one witness on her behalf.

The record as a whole does not indicate a breakdown in the adversarial process during trial. While it is true that McLean made relatively few objections during Marina's testimony elicited by the Department, this is not necessarily prejudicial. Moreover, James's lawyer objected vigorously and often throughout trial, including during Marina's testimony. Allowing most objections to come from another party may have been McLean's trial strategy, especially considering that Marina was the party with a history of parenting failures.

Furthermore, based on the evidence presented at trial, Marina cannot convincingly show that if she had a new trial, the result would be different. The properly admitted evidence of her repeated failure to parent her four older children, lack of compliance with ordered services, and unstable mental health clearly support the order of dependency.

Marina argues prejudice should be presumed and reversal is required under United States v. Cronic.[19] There, the court observed that prejudice is presumed where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"[2] or where "the accused is denied counsel at a critical stage of . . . trial."[21] Marina also cites Strickland v. Washington[22] for

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[19] 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[2] Id. at 659.

[21] Id.

[22] 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

support. There, Justice Brennan recognized that "counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel" constituting error without a showing of prejudice.[23]

Marina also cites Javor v. United States.[24] In Javor, the Ninth Circuit concluded that "when an attorney . . . sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary."[25]

Marina argues she was effectively without counsel at a critical stage of trial because McLean's sleeping constructively deprived her of counsel at trial. Similarly, she argues that ACA's withdrawal as her counsel effectively denied her the assistance of counsel at a critical stage because her new SCRAP attorney had not reviewed the record. She also argues that because McLean slept through portions of trial, like in Javor, his conduct inherently prejudiced her trial.

None of these claims requires reversal here. Marina cannot show that the adversarial process was compromised by any attention-lapse or sleeping by McLean. Thus, there is no basis for the claim that he "entirely fail[ed] to subject the [Department's] case to meaningful adversarial testing."[26] Moreover, this

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[23] Id. at 703 n.2 (Brennan, J., concurring in part and dissenting in part).

[24] 724 F.2d 831 (9th Cir. 1984).

[25] Javor, 724 F.2d at 833.

[26] See Cronic, 466 U.S. at 659.

record does not support the conclusion that McLean slept during trial, as occurred in Javor. Because the record does not support her sleeping claim, the fact that Marina's SCRAP attorney did not fully review the record prior to the presentation hearing did not prejudice Marina. There is no basis here to presume prejudice.

Marina next argues that she can prove prejudice. She points to the lack of a clear record that McLean slept as evidence of "both actual conflict and prejudice." This makes no sense. Rather, the absence of such a record is more likely based on the lack of evidence to support the claim of ineffectiveness of counsel.

Conflicting Representation

Marina argues that reversal is required because her counsel had an actual conflict of interest in this case. We disagree.

Rule of Professional Conduct (RPC) 1.7 prohibits representation of a client if "the representation of one client will be directly adverse to another client" except under certain circumstances and where the client waives the conflict of interest.[27] RPC 1.10 imputes the requirements of RPC 1.7 to all members of a firm.[28]

When counsel represents conflicting interests, reversal is required "where a defendant shows an actual conflict of interest adversely affecting counsel's

[27] RPC 1.7(a)(1).

[28] RPC 1.10(a).

performance."[29] In order to show adverse effect, the defendant must demonstrate "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests."[3]

Here, at the time of trial, it appears that another ACA lawyer represented Marina's oldest daughter in a dependency proceeding. Although the record is not entirely clear, we presume that was the case. Accordingly, McLean apparently had an imputed conflict of interest while representing Marina in this trial.

The record indicates Marina was unaware of this imputed conflict until after trial but before the presentation of proposed findings, conclusions, and orders. After the hearings, the trial court properly permitted ACA counsel to withdraw and appointed SCRAP as counsel for Marina.

Marina argues that her lawyer's conflict of interest requires reversal here. The adverse effect she points to is the fact that pleadings from the dependency proceeding involving her two older children were used as evidence in this case and also would presumably be used in the future to terminate Marina's parental rights to her daughter. But this evidence does not show an actual conflict, only a theoretical one that does not show ineffective assistance in this case.

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[29] McDonald, 143 Wn.2d at 513.

[3] Regan, 143 Wn. App. at 428 (internal quotations omitted).

Specifically, there is no showing that her counsel failed to pursue a plausible defense strategy or tactic on her behalf. From our review of the record, it appears the pleadings from the other case would have been admitted regardless of any objection by counsel. She also blames this conflict of interest for SCRAP's late substitution and the resulting "unfair proceeding" that deprived her of a new trial. This too is insufficient to prove an "actual conflict of interest adversely affecting counsel's performance." She has failed to identify even one "plausible alternative defense strategy or tactic [that] might have been pursued but was not."[31] Accordingly, her ineffective assistance claim based on this imputed conflict fails.

Marina has failed in her burden to show her ACA trial counsel was ineffective for any reason.

DEPENDENT CHILD

James and Marina separately argue there is insufficient evidence to support the court's orders of dependency. We disagree.

To establish dependency, the Department must show by a preponderance of the evidence that the child is dependent.[32] Under RCW 13.34.030(5)(c), a dependent child means any child who:

> Has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological or physical development.

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[31] See Regan, 143 Wn. App. at 428 (internal quotations omitted).

[32] RCW 13.34.110(1).

This court reviews a claim of insufficient evidence in a dependency case to determine whether substantial evidence supports the court's findings of fact and whether those findings support the court's conclusions of law.[33] Evidence is substantial if, when viewed in the light most favorable to the party prevailing below, a rational trier of fact could find the fact in question by a preponderance of the evidence.[34] In making this determination, this court does not weigh the evidence or credibility of witnesses.[35] A finding of dependency under RCW 13.34.030(5) does not require proof of actual harm, only a danger of harm.[36] When determining whether to enter an order of dependency, a trial court has broad discretion to consider all the facts and evaluate the risk of harm.[37] This court reviews a trial court's placement decision in a dependency proceeding for an abuse of discretion.[38]

Mother's Claims

Marina challenges Findings of Fact 3.7, 3.13, 3.14, 3.16, and 3.20. She also argues the findings do not support a conclusion of dependency. We

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[33] In re Dependency of E.L.F., 117 Wn. App. 241, 245, 70 P.3d 163 (2003).

[34] Id.

[35] Id. (citing In re Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973)).

[36] In re Dependency of Schermer, 161 Wn.2d 927, 951, 169 P.3d 452 (2007).

[37] Id. at 951-52.

[38] In re Dependency of A.C., 74 Wn. App. 271, 275, 873 P.2d 535 (1994) (citing In re Welfare of Coverdell, 39 Wn. App. 887, 895, 696 P.2d 1241, review denied, 102 Wn.2d 1009 (1984)).

disagree.

Finding of Fact 3.7 states, in substance, that Marina left her four older children alone on multiple occasions. Marina contends Finding 3.7 is not supported because she testified at trial that she did not leave her children alone but with another mother at the shelter and that she acknowledged doing so was a "mistake."

The record contains an agreed order of dependency and disposition from a prior case regarding two of Marina's older children, which contains findings of fact to the effect that over a period of several years, Marina left her children unattended numerous times, including once overnight. An agreed order from that case also contains findings that Marina's relatives could not easily locate her and were concerned for the children's safety and hygiene. Moreover, at trial, Marina testified that after she left her four children alone, including her youngest who was not even one year old, they were taken into foster care. The challenged finding is supported by substantial evidence.

Finding of Fact 3.13 states, in substance, that Marina lacked follow-through with her prior dependencies by failing to engage in offered services. Marina takes issue with the words: "The mother did not participate in ***any*** services . . . ."[39]

The record contains a permanency planning order for Marina's two older daughters that shows the Department made reasonable efforts to provide

[39] Clerk's Papers at 186.

services to her. It also shows Marina failed to stay in contact with the Department or to complete ordered services, including psychological evaluation, parenting classes, and domestic violence counseling, or to secure stable housing. Marina also testified to this.

To support her position, Marina points to her trial testimony in which she stated that she received some domestic violence counseling. James also testified that he had taken Marina to visit her daughters periodically. Notwithstanding this evidence, the judge's finding reflects how credible she found the testimony — a determination this court does not review.[4] Substantial evidence supports this finding.

Finding of Fact 3.14 states:

> The mother acknowledged being depressed, crying for no reason and receiving mental health services in the past.

This finding is supported by the agreed order of dependency for her older daughters, which was admitted as evidence. It indicates Marina had mental health problems and a history of abusive relationships. Marina also testified that she had been hospitalized for depression.

Marina argues the evidence is not sufficient to show that her mental health is a threat to the safety and welfare of J.T. She argues that the State's lack of evidence that she suffered depression after her hospitalization is fatal to this finding. But all the Department is required to show is a danger of harm, not

[4] See In the Matter of Pawling, 101 Wn.2d 392, 401, 679 P.2d 916 (1984) (appellate court not allowed to weigh evidence or credibility of witnesses).

actual harm.[41]

Finding of Fact 3.16 states that it was contrary to J.T.'s welfare to return home with Marina and there is no parent available to care for the child. Unchallenged Finding of Fact 3.18 states: "The court finds that pursuant to RCW 13.34.030(5)(c) no parent, guardian or custodian to care for the child [sic]." Both are supported by substantial evidence.

The evidence shows Marina's history of neglecting her four older children and her severe depression requiring hospitalization. The trial court was entitled to consider this parenting history in determining whether Marina was capable of caring for J.T.[42]

The record also contains testimony suggesting Marina did not know how to properly care for J.T. The Department presented evidence that Marina did not initially know how to properly bottle feed J.T. and that during visits she changed J.T.'s diaper and feed him more frequently than necessary, not recognizing when he simply needed soothing. The record also contains testimony from a visiting supervisor that Marina had a troubling lack of ability to remain focused on J.T. during visitation.

Marina's additional challenge to this finding on the basis that

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[41] Schermer, 161 Wn.2d at 951.

[42] See In re Dependency of J.C., 130 Wn.2d 418, 428, 924 P.2d 21 (1996) (Washington courts may consider a parent's history as a factor in weighing a parent's current fitness.) (citing In re Ross, 45 Wn.2d 654, 657, 277 P.2d 335 (1954) (on issue whether termination of parental rights is proper, entire record of parenthood is open to investigation and inquiry)).

homelessness alone is not a basis for determining dependency is unpersuasive. Nothing in the finding suggests that, as evidenced by unchallenged Finding of Fact 3.15, which states "Homelessness is not the only issue in this case."

Finding of Fact 3.17, a dispositional finding, states that reasonable efforts were made to eliminate the need to remove J.T. from the home. As already discussed, the Department offered services in regard to Marina's older dependent children but, despite being ordered to participate in them, Marina did not. Significantly, no evidence showed Marina's parenting skills had improved or that anything had changed since her older children were declared dependent. Accordingly, the court did not abuse its discretion by finding J.T. should be placed outside the home.

Marina argues the finding is unsupported because there is no evidence the Department provided services in order to prevent J.T.'s removal. But she cites no authority requiring the Department to make such an additional effort prior to intervening on J.T.'s behalf.

Marina also argues the Department's efforts were not reasonable because its interactions with her in the hospital were adversarial, conducted in English without an interpreter, and involved large amounts of paperwork. But the Department's investigative interactions with Marina were not "services" as discussed in the finding. Moreover, unchallenged Conclusion of Law 4.2 stated: "The mother received proper notice."

Marina next challenges dispositional Finding of Fact 3.20, which states, in substance, that the Department made efforts to place the child with a relative. The record contains testimony that Andrea Ambrose, a social worker, spent a week investigating whether to place J.T. with one of Marina's relatives. Ambrose testified that she spoke with J.T.'s grandmother but that none of Marina's sisters returned her calls. Accordingly, the court did not abuse its discretion in determining the Department explored placement with family members. Marina argues that the effort was inadequate, but her disagreement with the judge on this point does not show an abuse of discretion.

Finally, Marina challenges Conclusion of Law 4.3, which states: "The child should be found dependent pursuant to RCW 13.34.030(5)(c)." Marina's only argument is that the challenged findings are unsupported and, therefore, render this conclusion erroneous. As already discussed, substantial evidence supports all of the challenged dependency findings. Moreover, unchallenged Finding of Fact 3.18 states: "The court finds that pursuant to RCW 13.34.030(5)(c) no parent, guardian or custodian to care for the child [sic]."

Together, all the findings support the court's conclusion that J.T. was dependent because there was "no parent . . . capable of adequately caring for the child, such that [J.T. was] in circumstances which constitute a danger of substantial damage to [his] psychological or physical development."[43] Furthermore, based on the evidence and circumstances here, the trial court did

[43] See RCW 13.34.050(5)(c).

not abuse its discretion by finding that J.T. should be placed outside the home.

Father's Claims

James challenges Findings of Fact 3.8, 3.15, 3.16, 3.17 and 3.18 and argues that the court's findings do not support a conclusion of dependency. We disagree.

Finding of Fact 3.8 states, in substance, that James did not understand the mother's parenting history and the risk it posed to J.T. James argues there was no evidence that, at the time he initially indicated to a social worker that he intended to leave the baby with Marina, he knew the full extent of Marina's history of neglect and mental health issues. But James testified at trial that ***after*** he understood the Department's issues with Marina and saw the dependency and dispositional orders regarding her older children, he still thought it was a good plan for Marina to take care of their baby while he worked. Moreover, although James testified that he knew Marina had been hospitalized for depression after the birth of one of her older children, he did not recognize the similarity of the current circumstances, the risk that Marina faced from post-partum depression, or the danger this posed to J.T. The challenged finding is supported by substantial evidence.

That James may not have been given complete information about Marina's history with the Department earlier in the case is not significant. Once he knew about Marina's history (and especially after Marina testified at trial about her prior neglect), James persisted in his desire to have her care for J.T.

Regardless of the assurances he believed he had from Marina to take good care of their child, his lack of concern over Marina as a fulltime care giver for J.T., given her history, provided a reasonable basis for the court to find as it did.

James next challenges the portions of Findings of Fact 3.15, 3.16, 3.17 and 3.18 in which the court found he was not in a position to parent J.T. and that it was contrary to J.T.'s welfare for the child to return home. He argues there is insufficient evidence he lacked insight into Marina's parenting deficiencies or that his angry and unusual behavior posed a risk to J.T.'s psychological or physical development.

The evidence shows James was hostile, angry, and aggressive toward the professionals who worked with him and that he subjected J.T. to this behavior. In unchallenged Finding of Fact 3.9, the judge found that James "exhibited un[u]sual responses to normal situations" including an eruption of "loud, profane and threatening behavior" toward hospital nursery staff after they requested Marina to breastfeed J.T. In unchallenged Finding of Fact 3.10, the judge found James exhibited "another out of proportion response to the situation" by calling 911 to report that his child, who was sleeping, had been drugged by the social worker. In addition, unchallenged Findings of Fact 3.11 and 3.12 states, in substance, that James held J.T. up to the two-way visitation mirror and cursed and used profanity toward the people behind it with J.T. in his arms. The court found this was "inappropriate parenting" during visitation and that "[t]he child should not be subject to such anger and profanity." In addition,

the court found that James's interactions with Department personnel were intimidating, threatening, and aggressive to the point that "workers have feared for their safety and the safety of the child and others in the presence of the father." A social worker also testified that both parents needed to have mental health issues addressed before J.T. would be safe in their care.

A rational trier of fact could conclude from this evidence that James posed a risk to J.T.'s psychological or physical development. Thus, substantial evidence supports the finding that James was not in a position to parent J.T. Moreover, as we have discussed already, substantial evidence also supports the finding that James failed to understand Marina's parenting deficiencies and mental health issues.

James also contends that because the findings he challenges are not supported by substantial evidence, that homelessness is the only remaining basis for the court to have found J.T. dependent. James is mistaken. As the findings already discussed above show, homelessness was not the sole basis for the court's conclusion that J.T. was dependent. Accordingly, the court's Finding of Fact 3.15, which states, in part, "Homelessness is not the only issue in this case" is supported by substantial evidence. Accordingly, none of the cases James cites requires a different result here.

Finally, James argues that because the findings are unsupported, they do not support Conclusion of Law 4.3 — that J.T. was a dependent child under RCW 13.34.030(5)(c). However, the unchallenged and supported findings that

we have already discussed permit the logical conclusion that James was not a "parent . . . capable of adequately caring for [J.T.], such that [J.T. was] in circumstances which constitute a danger of substantial damage to [his] psychological or physical development." Accordingly, the court's findings support this order of dependency.

Contrary to James's argument, no expert testimony was necessary for the judge to determine that his behavior posed a risk to the child.[44] Moreover, it is not significant that the record contains testimony that no one observed James physically threaten or harm J.T. or others. It was unnecessary for the judge to find misconduct on James's part in order to find J.T. dependent.[45]

Finally, because James was not in a position to parent J.T., the court did not abuse its discretion in finding it was not in the child's welfare to return home and in ordering out-of-home placement for the child.

We affirm the dependency and dispositional orders.

Cox, J.

[44] See Schermer, 161 Wn.2d at 951-52 (trial court has broad discretion in evaluating risk of harm to child when determining whether to enter order of dependency).

[45] See id. at 943 (under RCW 13.34.030(5), it is unnecessary to find parental misconduct in order to find a child dependent).

WE CONCUR: